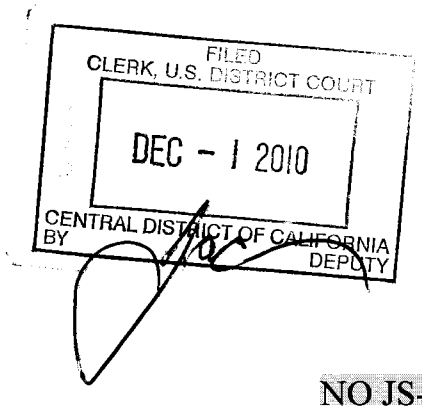

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NO JS-6

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
(Western Division-Los Angeles)

KEVIN SO, Plaintiff, v. LAND BASE, LLC, et al. Defendants.	CASE NO. CV 08-03336 DDP (AGRx) **JUDGMENT AS TO KONDAS DEFENDANTS PURSUANT TO RULE 54(b)**

Defendants Kevin R. Kondas, Mira M. Meltzer, KM & Associates International, LLC, CTL Projects International, LLC, and KB&M Projects International, LLC (collectively the "Kondas Defendants"), filed a motion for summary judgment which was granted by this Court on September 2, 2010, (Dkt. 473, the "Summary Judgment Order"),

as to all of Plaintiff's claims against the Kondas Defendants. Plaintiff Kevin So ("Plaintiff"), having moved the Court pursuant to Federal Rule of Civil Procedure 54(b) for issuance of a final judgment incorporating the rulings contained in the Summary Judgment Order, for purposes of initiating an immediate appeal thereof, and good cause appearing therefor,

IT IS HEREBY ORDERED that Judgment is granted in favor of the Kondas Defendants and against Plaintiff in accordance with the Summary Judgment Order, attached hereto as Exhibit 1 and incorporated herein.

IT IS FURTHER ORDERED that the Court finds there is no just cause for delay and that the Clerk is hereby directed to enter this as a final Judgment upon its filing, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Kondas Defendants are awarded costs.

SO ORDERED.

Dated: December 01, 2010

United States District Judge

EXHIBIT "1"

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEVIN SO, Plaintiff, v. LAND BASE, LLC; UNIVEST FINANCIAL SERVICES, INC.; BORIS LOPATIN, individually and d/b/a BORIS LOPATIN ASSOCIATES and CHARLES W. WOODHEAD, Defendants.	Case No. CV 08-03336 DDP (AGRx) **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT FILED BY KONDAS, MELTZER, KM&A, KM&B, AND CTL** [Motion filed on May 7, 2010]

This matter comes before the Court on Moving Defendants' Motion for Summary Judgment or, alternatively, for Summary Adjudication.

I. Background

A. Ponzi Scheme and HSBC Litigation

The plaintiff Kevin So ("Plaintiff") has participated in several lawsuits to recoup a $30 million investment he made in 2005 in an investment called the Private Placement Project, which turns out to have been a Ponzi scheme operated by a British man named Michael Brown.

Plaintiff alleges that his financial advisor and agent, Lucy Lu ("Lu"), conspired with several defendants in the United States- Boris Lopatin, Land Base, the Moving Defendants, and others- to induce Plaintiff to invest in the Ponzi scheme.

Once the Ponzi scheme came to light, HSBC Bank- whose accounts were used to further the scheme- filed a lawsuit for declaratory relief (the "U.K. Litigation") against several investors, and named Plaintiff as one such defendant in November 2005. Plaintiff filed counterclaims for breach of contract, breach of trust, and negligence, arguing that HSBC and Michael Brown- the man who operated the Ponzi scheme- were solely responsible for his losses. Following seven-week trial in October and November of 2007, the court issued a Judgment rejecting Plaintiff's claims against HSBC.

B. Present Case and Allegations Against Moving Defendants

1. Complaint

Plaintiff filed this case in May 2008, naming Boris Lopatin, Land Base LLC, Charles W. Woodhead, and Univest Financial Services, Inc. as defendants. The Complaint alleged that in December 2004, Lopatin, through his company Land Base LLC, "developed a scheme whereby they, along with non-party Keith Millar, would entice wealthy investors to deposit money into accounts to be managed by supposed bond-trader and non-party co-conspirator, Michael Brown." (Compl. ¶ 10.) The Complaint alleged Millar was a friend of his agent and fiduciary, Lucy Lu, and that he (1) introduced Lu to the Lopatin Defendants and (2) convinced Lu that Plaintiff should invest in the Ponzi scheme by representing that it was a legitimate investment with no risk. (Id. ¶¶ 29-33.) The Complaint did not name any Doe defendants.

2. First Amended Complaint

On January 16, 2009, Plaintiff filed the First Amended Complaint ("FAC"), which asserted claims against Moving Defendants, Kevin Kondas, Keith Millar, KM & Associates International, LLC, KB&M Projects International, LLC, CTL Projects International LLC, and Mira Meltzer. According to the FAC, (1) Kondas and Millar are both principles of KM&A, (2) Lopatin and KM&A are both principals of KB&M, (3) Meltzer maintained a business relationship with Kondas and Millar, and (4) Meltzer and Kondas were managing members of CTL. (FAC ¶¶ 7-14.)

The FAC alleges that, after convincing Lu to invest Plaintiff's money in the Private Placement Project, "Millar requested that Lu and So execute an 'Irrevocable Project Funding Agreement' ('IPFA')," which provided that "KM&A was to receive 'project funding, essentially a twenty percent (20%) fee from any profits So earned in the Private Placement Project." (Id. ¶ 56.) In addition, "KM&A and its principals, Millar and Kondas, along with their business partner Mira Meltzer, received in excess of $600,000 in 'project funding' payments directly from the $30 million in principal So had invested. These payments were made pursuant to the IPFA for purportedly profitable trades." (Id. ¶ 112.) The IPFA, attached to the FAC as exhibit C, is signed by Kondas on behalf of KM&A. (Id. Ex. C.) Plaintiff alleges that KB&M and CTL were entities used "to assist with sharing, hiding, and distributing the proceeds from the Private Placement Project." (Id. ¶ 114.)

The FAC alleges that once the Ponzi scheme came to light, Lopatin convinced Plaintiff "to retain Lopatin's friend and

business associate, Leonard J. Suchanek ('Suchanek'), an attorney working out of Washington, D.C., to assist him in the HSBC Litigation. Suchanek was assisted at all relevant times by Defendant Meltzer, whom Suchanek employed as a legal assistant." (Id. ¶ 105.)

The FAC refers to KM&A, Kondas, Millar, and Lopatin as the "Conspiring Defendants" and asserts claims against them for fraud/intentional misrepresentation, negligent misrepresentation, breach of fiduciary duty, fraud based on concealment of material facts, conversion, and civil conspiracy. The FAC also asserts claims for unjust enrichment/quasi contract and constructive trust against all of the Moving Defendants, including Meltzer.

3. Second Amended Complaint

On June 12, 2009, Plaintiff filed a motion to amend the complaint, seeking to add "Meltzer, who we learned served as a director of Defendant KM& Associates International LLC ('KM&A') to the existing causes of action" against the other Moving Defendants. The Court granted the motion and Plaintiff filed the Second Amended Complaint ("SAC") on July 16, 2009.

C. Motion and Moving Defendants' Evidence

Moving Defendants argue that a three-year statute of limitations applies to all claims against them, that Plaintiff had notice of the claims in the fall of 2005, and that all claims- which were raised no earlier than January 2009- are time barred.

In support of this argument, Defendants have submitted a privilege log produced by Plaintiff indicating (1) that he retained counsel in connection with the HSBC matter in October 2005, (2) that he was forwarded draft pleadings by counsel in connection with

the HSBC litigation in December 2005, and (3) that he personally communicated with counsel in December 2005. (Second Thibodo Decl. Ex. D, So Privilege Log at pp. 76-77, 446, 451.) Defendants argue this evidence shows Plaintiff was on notice of the existence of the Ponzi scheme in the Fall of 2005.

In addition, Defendants have submitted the deposition testimony of Plaintiff, in which he stated that (1) defendant Lu told him that "she had already signed a contract with KM. And KM is an entity of the U.S. Federal Bank, and Kondas is an official at U.S. Federal Bank, and this 20-percent commission is something that has to be paid to him," (First Thibodo Decl. Ex. B 55:13-17); and (2) "[e]very time when funds were needed to be wired to KM & A, Lu would bring it up. And she would say that pursuant to the contract . . . there was a 20-percent commission payable to KM & A. And at each payment, KM & A would issue a receipt." (Id. 55:4-9.)

Finally, Defendants submit transcripts of Plaintiff's testimony in the U.K. trial, in which he stated that he was contacted by an HSBC representative in November 2005. Plaintiff testified: "During my conversation with this gentleman, I was told there was some problem between HSBC bank and Mr. Brown. He asked me to co-operate with the investigation in order for me to get my $30 million investment back." (First Thibodo Decl., Ex. I, So Trial Testimony 65:3-66:23.)

Alternatively, Defendants argue that they are entitled to summary adjudication of Plaintiff's claims for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and conspiracy to commit fraud because (1) "none of the KM Defendants made any representation to him that caused him to

act to his detriment," (Mot. 22:18-21) and (2) Plaintiff cannot show justifiable reliance because he admitted "that the very misrepresentations he alleges in his Second Amended Complaint were 'completely incredible.'" (Id. 22:22-25.)

D. Plaintiff's Opposition and Evidence

Plaintiff opposes the motion, arguing that the accrual of the statute of limitations is delayed by the discovery rule and the "last overt act" doctrine and that equitable tolling based on fraudulent concealment applies. Plaintiff relies heavily on his own declaration. Plaintiff states in his declaration that (1) he did not know that KM&A received a "commission" until his lawyers informed him of this fact in November 2008; (2) when he was contacted by an HSBC representative in November 2005, he was simply asked some questions regarding Michael Brown and the investment; (3) he did not learn that his money was stolen until March or April of 2006, when he discovered that Lu, without his permission or knowledge, had retained counsel for him in the HSBC litigation. (So Decl. ¶¶ 10-11.)

Plaintiff's declaration also states that Lu convinced him to hire Suchanek, who was assisted by Meltzer, as an attorney in 2006. (Id. ¶¶ 12-13.) Meltzer did not reveal to Plaintiff (or, apparently, to Suchanek) that she was involved with KM&A and had received proceeds from his investment. Suchanek failed to disclose to Plaintiff that he was representing Lopatin at the same time, and, while representing Lopatin, continued to advise Plaintiff until late 2007 that the Private Placement Project was legitimate.

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II. LEGAL STANDARD

Summary judgment and summary adjudication are appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The nonmoving party is not, however, required to "produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 324 (1986).

All reasonable inferences from the evidence must be drawn in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 255 (1986). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." Id. at 248. No genuine issue of fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. DISCUSSION

A. Statute of Limitations

Plaintiff does not dispute that a three-year statute of limitations applies to all claims against the Moving Defendants, nor that the face of the FAC indicates that the claims are time-barred absent some basis for equitable tolling or delayed accrual. Rather, Plaintiff argues that his claims are not time-barred because of (1) the "last overt act" doctrine, (2) the discovery rule, and (3) equitable tolling based on fraudulent concealment.

1. "Last Overt Act"

Plaintiff argues that the statute of limitations does not begin to run until the "last overt act" in furtherance of the conspiracy is complete. According to Plaintiff overt acts in furtherance of the conspiracy include defendants "efforts to hide bank records; Lu's submission of a false witness statement to the UK Court in August of 2009, Meltzer's ongoing efforts to conceal her, KM&A and her business partners' roles in the fraud, which continued at least throughout the course of the UK litigation." (Opp'n 19:17-20.)

Under California law, "when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run . . . until the 'last overt act' pursuant to the conspiracy has been completed." Wyatt v. Union Mortgage Co., 598 P.2d 45, 53 (Cal. 1979). This is because "[s]o long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built upon the passage of time." Id. An "overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." People v. Zamora, 557 P.2d 75, 82 n.8 (Cal. 1976) (internal quotation marks and citation omitted).[1] Therefore, an overt act "cannot succeed

[1]Although Zamora involved a criminal conspiracy, "its conclusions are applicable as well to a civil conspiracy" because "'[t]he differences between civil and criminal conspiracies are somewhat beside the point' in applying the statute of limitations." Livett v. F. C. Financial Assoc., 177 Cal. Rptr. 411, 419 (Ct. App. 1981) (quoting Wyatt, 598 P.2d at 53).

the completion of the substantive offense which is the object of the conspiracy." Id.

An act of concealment will only be considered a "last overt act" delaying accrual of the statute of limitations where concealment is itself the underlying offense and the object of the conspiracy. In Zamora, the defendants were convicted of conspiracy to commit arson, conspiracy to burn insured property with intent to defraud the insurer, and conspiracy to commit grand theft in connection with their scheme to burn down a residential building in order to collect insurance proceeds. Id. at 77. On appeal, Zamora argued that the counts were barred by a three-year statute of limitations. Id. at 78. As to the conspiracy convictions, the Government pointed to the defendants' efforts to conceal the injuries one of them sustained in the fire, arguing that such concealment should constitute the "last overt act" in furtherance of each of the three conspiracies. Id. at 83.

The court rejected this argument, holding that an act of concealment cannot constitute the "last overt act" in furtherance of a conspiracy whose object has already been accomplished. The court explained that because "every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces," allowing "such a conspiracy to conceal to be inferred or implied from the mere overt acts of concealment would . . . extend the life of a conspiracy indefinitely" and would "for all practical purposes wipe out the statute of limitations in conspiracy cases . . . ." Id. at 89 n.18 (internal quotation marks and citations omitted). Therefore, the court also rejected the notion that an act of concealment can constitute the "last overt act" where an explicit

agreement to conceal is shown, since an "arbitrary" distinction between explicit and implicit agreements would be "contrary to the well established rule that the unlawful design of a conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy." Id. at 89.

Ultimately, the court concluded that "acts committed by conspirators subsequent to the completion of the crime which is the primary object of a conspiracy cannot be deemed to be overt acts in furtherance of that conspiracy." Id. "Consequently, upon successful attainment of the substantive offense which is the primary object of the conspiracy, the period of the statute of limitations begins to run at the same time as for the substantive offense itself." Id. In so holding, the court noted that because it "perceive[d] little distinction between concealment of ac rime by conspirators and the concealment usually undertaken by a single criminal offender," there was "little reason to create a special conspiracy exception which would afford, in effect, an extended limitation period." Id. at 87. As a result, the court reversed the conspiracy convictions because "[t]he conspiracies to commit arson and to burn insured property were completed . . . when the fire was ignited" and "[t]he conspiracy to commit grand theft was complete with receipt of the last insurance payment . . . ." Id. at 90.

On the other hand, in People v. Williams, 158 Cal. Rptr. 778 (Ct. App. 1979) [hereinafter Williams II], the court held that an act of concealment could constitute the "last overt act" in furtherance of a conspiracy to conceal stolen property where

concealing stolen property was itself the underlying offense and the object of the conspiracy. In that case, the defendants were charged with receiving and concealing stolen property and conspiring to do the same. The court held that because "the substantive crime underlying the alleged conspiracy is concealment of stolen property," in violation of California Penal Code section 496, the conspiracy to conceal stolen property "terminated when the crime of concealment terminated." Id. at 782.

However, in the companion case, Williams v. Super. Ct., 146 Cal. Rptr. 311, 319 (Ct. App. 1978) [hereinafter Williams I], the court "assume[d] for purposes of this decision that there were two separate conspiracies, one to receive and another to conceal" the stolen property. The court concluded that although the act of concealment constituted a "last overt act" in furtherance of the conspiracy to conceal stolen property, it did not constitute a "last overt act" in furtherance of the conspiracy to receive stolen property because the underlying offense was completed upon the transfer of the property to the defendant. Id. As a result, the court held that while the conspiracy to conceal stolen property was not time-barred, the conspiracy to receive stolen property was "barred by the statute of limitations." Id.

In this case, Plaintiff alleges that Moving Defendants conspired to defraud Plaintiff into investing in the Private Placement Project Ponzi scheme. Following the reasoning in Zamora, the court concludes that the acts of concealment subsequent to Plaintiff's investment in the Private Placement Project cannot constitute "overt acts" in furtherance of the conspiracy to defraud Plaintiff into making that investment. Zamora, 557 P.2d at 89

("[U]pon successful attainment of the substantive offense which is the primary object of the conspiracy, the period of the statute of limitations begins to run at the same time as for the substantive offense itself.")

Following the reasoning in Williams I and Williams II, it is perhaps conceivable that Plaintiff could have attempted to establish that defendants entered into a separate conspiracy to defraud Plaintiff into paying their legal bills or into hiring Suchanek once the Ponzi scheme was discovered. But, the FAC does not plead such a claim with the required degree of particularity. Wasco Prods., Inc. v. Southwall Techs., Inc., 435 F.3d 989, 992 (9th Cir. 2006) (affirming summary judgment on statute of limitations grounds where specific elements of conspiracy in support of "last overt act" doctrine were not adequately alleged). Nor would such a claim, even if properly pled, delay accrual of the statute of limitations with respect to the conspiracy to defraud Plaintiff into investing in the Private Placement Project in the first place. Williams II, 146 Cal. Rptr. at 319 (holding that where "there were two separate conspiracies, one to receive and another to conceal" stolen property, the former was time-barred notwithstanding the fact that the last overt act in furtherance of the latter occurred within the statutory period).

2. Discovery Rule

Alternatively, Plaintiff argues that his claims fall within the statute of limitations based on the discovery rule. The statute of limitations typically commences when the cause of action accrues, which occurs on the date of injury. Jolly v. Eli Lilly & Co., 751 P.2d 923, 926 (Cal. 1988). However, this general rule is

modified by the common law "discovery rule." Id. "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." Id. at 927. Thus, "the limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry." Id. at 928 (internal quotation marks and citation omitted). As the California Supreme Court put it:

> A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.

Id. But, while "ignorance of a generic element of the cause of action" will delay accrual of the statute of limitations, "ignorance of the identity of the defendant does not . . . ." Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 923 (Cal. 2005) (emphasis added).

In this case, the undisputed facts show that Plaintiff was on inquiry notice of his claims by no later than the Fall of 2005. Defendants have presented evidence that by December of 2005: (1) Michael Brown's Ponzi scheme had come to light, (2) HSBC had frozen Plaintiff's account and sued Plaintiff for declaratory relief, (3) Plaintiff had hired a team of lawyers, (4) Plaintiff had privileged communications with his lawyers and had reviewed draft pleadings in connection with the lawsuit, and (5) Plaintiff had been contacted by an HSBC representative and told that if he cooperated he could "get [his] $30 million investment back." These facts were sufficient to put a reasonable person in Plaintiff's position on

inquiry notice "that [his] injury was caused by wrongdoing . . . ." Jolly, 751 P.2d at 927.

The only evidence submitted by Plaintiff that purportedly contradicts these facts is Plaintiff's declaration. Plaintiff's declaration states, in pertinent part: (1) "In or around November of 2005, a representative from HSBC contacted me and asked me questions regarding Michael Brown and his investment program," but "[w]hen I inquired of Lu about HSBC's phone call, Lu told me she spoke with Lopatin and confirmed that the call related to a problem between HSBC and Brown and that the investment funds were safe at HSBC," (So Decl. ¶ 11); (2) "In March or April 2006, I learned that Lu, without notifying me or seeking my authority, had retained UK counsel to act on my behalf in October or November of 2005," (id.); and (3) "I did not learn that my funds were stolen until in or around March or April of 2006." (Id.)

The first statement about his conversation with an HSBC representative is so vague that it does nothing to controvert Plaintiff's sworn testimony that the representative told him he could "cooperate" with HSBC in order to get his "$30 million investment back." (First Thibodo Decl., Ex. I, So Trial Testimony 65:3-66:23 (emphasis added).) The second statement directly contradicts Plaintiff's privilege log, which indicates that one such lawyer hired on his behalf sent him draft pleadings in connection with the HSBC litigation and had a privileged conversation with him in December 2005. The third statement is conclusory, self-serving, and also at odds with Plaintiff's privilege log and his sworn testimony concerning his discussion with the HSBC representative. The Ninth Circuit has "refused to

find a 'genuine isue' where the only evidence presented is 'uncorroborated and self-serving' testimony." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (citing Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)); see also FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

Therefore, the undisputed facts show that Plaintiff was on inquiry notice of his claims no later than December 2005, more than three years before he filed the FAC in this lawsuit. Even assuming that Plaintiff was unaware of the identities of some of the defendants until later, "ignorance of the identity of the defendant" does not delay accrual of the statute of limitations pursuant to the discovery rule. Fox, 110 P.3d at 923.

3. Fraudulent Concealment

Finally, Plaintiff argues that the statute of limitations should be tolled because the Moving Defendants fraudulently concealed their identities. In particular, Meltzer acted as a legal assistant to Plaintiff's lawyer, Suchanek, without disclosing (1) her connection to the other Moving Defendants and (2) the fact that Suchanek simultaneously represented Lopatin. Additionally, while Meltzer assisted Suchanek, Suchanek advised Plaintiff that he did not have a potential claim against Lopatin, KM&A, or Kondas.

The California Supreme Court has recognized "the equitable principle that a defendant who intentionally conceals his or her identity may be equitably estopped from asserting the statute of limitations to defeat an untimely claim . . . ." Bernson v.

Browning-Ferris Indus., 30 Cal. Rptr. 2d 440, 444-45 (1994). "[W]here the bar [of the statute of limitations] becomes a sword rather than a shield, wielded by a party that has intentionally cloaked its identity, factors of fairness and unjust enrichment come into play, which courts are bound to consider in equity and good conscience." Id. at 445. Therefore, the statute of limitations "may be equitably tolled" when "as a result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity." Id. at 446.

But, this "rule of equitable estoppel includes, of course, the requirement that the plaintiff exercise reasonable diligence." Id. As a result, "the statute will toll only until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity." Id. "One factor which must be considered pertinent to the diligence inquiry is whether the filing of a timely Doe complaint would, as a practical matter, have facilitated the discovery of the defendant's identity within the requisite three-year period for service of process." Id. "Where the identity of at least one defendant is known, for example, the plaintiff must avail himself of the opportunity to file a timely complaint naming Doe defendants and take discovery." Id. (emphasis added). California Code of Civil Procedure section 474 permits a plaintiff to file suit against a Doe party and "[f]rom the time such a complaint is filed, the plaintiff has three years to identify and serve the defendant." Jolly, 751 P.2d at 932 (discussing Cal. Code Civ. P. § 474). Section 474 "effectively enlarg[es] the statute of limitations period by three years." Id.

Here, it is clear that Plaintiff could have filed a timely Doe Complaint within the limitations period. In fact, Plaintiff filed the Complaint in this action on May 20, 2008, just over two years into the limitations period, naming Land Base, Boris Lopatin, and Charles Woodhead, and alleging that "Land Base and Lopatin, acting in concert with various non-party co-conspirators" engaged in a "conspiracy wherein these Defendants intended to and did steal millions of dollars from unsuspecting investors like the Plaintiff." (Compl. ¶ 1.) The Complaint, did not, however, name any Doe defendants in the caption, nor did it assert any claims against Doe defendants. See Fireman's Fund Ins. Co. v. Sparks Const., Inc., 8 Cal. Rptr. 3d 446, 452 (Ct. App. 2004) (noting that section 474 requires that the complaint allege a claim against each Doe defendant and allege that the plaintiff is ignorant of the Doe defendant's names). Furthermore, Plaintiff filed suit against his former attorney, Suchanek, in December 2008 based on his failure to disclose that he had a conflict of interest due to his representation of Lopatin, but Plaintiff still did not seek to amend his complaint in this case to name Doe defendants.

Because the undisputed facts show that Plaintiff failed to exercise due diligence, he is not entitled to rely on fraudulent concealment to toll the statute of limitations. Bernson, 30 Cal. Rptr. 2d at 446.

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IV. Conclusion

For the reasons set forth above, the Court GRANTS the Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: September 2, 2010

DEAN D. PREGERSON
United States District Judge